Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-472

AFTON M. COON and VERA COON,
Petitioners,

vs.

CHARLES W. BLIVEN & CO., INC. et al.,
Respondents.

REPLY OF HERBERT W. WHITE, et ux. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. We assume that certiorari is sought under the rule which provides for the granting of certiorari where a Court of Appeals has rendered a decision in conflict of the decision of another Court of Appeals on the same matter; or has decided a matter of state or territorial question in a way in conflict with applicable state or territorial law.

In their brief, Petitioners say (Br. 14), that the reasons for granting the writ are as follows:

1. This Court represents the last hope for an elderly retired couple to have some chance of recouping their life savings, which were taken from them for a conceded pile of scrap disguised as a yacht.

2. The opinion of the Court of Appeals stands as a now unchallenged textbook for an already unscrupulous business to continue preying on the elderly, naive and inexperienced. It stands at least as a gratuitous guide for them on Florida's extensive waterline as it interprets Florida law, subject to adoption in other states. There would seem to be no distinction, as noted by the Trial Judge, between the sale of a used yacht and a used car (A. 173).

3. Abandonment of Admiralty's traditional application of equitable principles by the Court below for a *caveat emptor* concept is best illustrated by Respondent Bente, when observing the then revealed true condition of the yacht, advised Petitioners to put it together so he could sell to someone else. There must be some redress against that type knavery.

4. Even if Florida law were applicable to this contract, the Court Below did not follow Florida law, or even its own interpretation of Florida law.

5. The Court Below made impossible findings of fact in its opinion, which have no support in the record, and hamper even the trial allowed.

6. Finally, can this Court really allow this elderly couple from Alaska, and countless others to follow, to be limited in the pursuit of recovery of their life

savings from an impoverished, incompetent, uninsured surveyor, an exercise in futility, while the culprits with the money, those who knowingly perpetrated the fraud (as distinguished from the incompetence of the surveyor they chose and foisted on Petitioners), are rewarded for their misdeeds?

There is not even a suggestion to these enumerated reasons that a conflict exists which would justify the granting of certiorari.

In the vain expectation that this omission might be supplied elsewhere, we have had recourse to page 16 of Petitioners' brief entitled "Legal Arguments," there is not even an inkling here that a conflict exists for the granting of a petition for certiorari under this topic. We will therefore have to deal with this unorthodox situation in the same way.

Numerous cases are cited as will hereinafter appear but not a single one furnishes support to the Petitioners' position.

Petitioners suggest that in *Sherman* v. *Hallbauer*, 455 F.2d 1936 (5th Cir. 1972) it is indicated that a point of law exists in the cited case which might in some way have some bearing on the case at bar. Even if there were any collision with this case and the case at bar this would not justify certiorari.

The *Sherman* case is quoted on page 19 as holding that:

"Florida cases hold that misrepresentation by a seller * * * or his selling agent * * *, is actionable if the representor knew, or should have known, of the falsity of his representation," (Citations omitted).

Petitioners further say that "there is consequent confusion if one were to read the *Hallbauer* (*Sherman*) opinion, and then the interpretation thereof by the same court, and it must be clarified."

Even here there is no suggestion of a conflict between *Sherman* and *Hirschman* v. *Hodges, O'Hara & Russell Co.*, 51 So. 550, 554 (Fla. 1910) cited by the Court of Appeals in its opinion under consideration.

Furthermore, the court below dissipated any such inference, if there were any, in its footnote as follows (Br. App. 14):

> "Appellants' reliance on Sherman v. Hallbauer, 455 F.2d 1286 (5th Cir. 1972) is misplaced. In Sherman, this Court held only that the district court had erred in granting the defendant surveyor's motion for summary judgment in light of the fact that the plaintiffs had pleaded facts sufficient to establish a contractual relationship between themselves and the surveyor, as was required for recovery in a negligence action against a surveyor under Florida law."

The other cases cited by petitioners may be disposed of summarily.

Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961);
Pope & Talbott, Inc. v. *Hawn*, 346 U.S. 404 (1953);

Knickerbocker Ice Co. v. *Stewart*, 253 U.S. 149 (1919) are cited to the point that admiralty cases should be given uniform national interpretation.

This suit was not an admiralty cause. It was a suit to rescind a contract for the sale of a boat and thus a diversity case controlled by Florida law, *See The Ada*, 250 F. 194 (2d Cir. 1918) and *Grand Banks Fishing Co.*,

Inc. v. *Styron*, 114 F.Supp. 1 (D.Me. 1953). The District Court and the Fifth Circuit each held that under Florida law and the facts of this case, there could be no rescission where the plaintiffs in the District Court did not "justifiably rely" on any representations of the sellers but instead conducted their own investigation as to the condition of the vessel.

At this point it is significant to note that the judgment of the District Court contains this statement:

> "at oral argument on the motions for summary judgment, plaintiffs agreed to dismiss defendant Charles W. Bliven with prejudice from the suit. At that time plaintiffs also amended their complaint orally to allege that the surveyor, Joseph B. Fronapfel, was employed by the plaintiffs to conduct a marine survey."

The trial court also found in the judgment that the plaintiff contracted to purchase the vessel according to an Offer to Purchase and Deposit Receipt which was attached to the pretrial stipulation and signed by the Coons. The District Court opinion recites that the contract of the plaintiff provided that they were to purchase the vessel for $45,000 "where is" and "as is" subject to a survey and trial run to be made by the plaintiffs or their agents to the satisfaction of the plaintiffs.

The judgment also recites that the Coons endorsed on the contract a statement as follows:

> "Trial run, survey and New Horizon accepted for $43,000. Afton Coon."

The judgment adds that they, meaning the petitioners, "have retained possession until the present time and have not offered or tendered to return of the vessel."

The remaining cases cited in petitioners' brief are entirely inapposite.

Florida Bahamas Lines, Ltd. v. *Barge "Star 800"*, 443 F.2d 1243 (5th Cir. 1970) holds that the Chancellor has freedom to apply admiralty law. To the same effect are:

Texas Gulf Sulphur Co. v. *Blue Stack Towing Co.*, 313 F.2d 359 (5th Cir. 1963); *Murphy* v. *Light*, 211 F.2d 824, 224 F.2d 844 (5th Cir.) and *Pope & Talbott, Inc.* v. *Hawn*, 346 U.S. 404.

In its opinion, the Court of Appeals said (App. 14):

> "In their motion for summary judgment below, the Whites asserted that assuming arguendo that there were misrepresentations as to the condition of the vessel as a matter of law, appellants did not 'justifiably rely' on any representations of the sellers but instead conducted their own investigation of the yacht's condition. Appellants' contentions to the contrary notwithstanding, we find that Florida law is quite clear on this point. The Supreme Court of Florida has stated:
>
> > 'If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences or purports, or professes to commence

> an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness.' "

CONCLUSION

The petitioners have not shown a single instance in which the Court of Appeals for the 5th Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter nor has it decided a matter of state or territorial question in a way in conflict with applicable state or territorial law.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply were mailed to James A. Rooney, 136 Centre Avenue, New Rochelle, New York; Richard C. Waller, 350 Lincoln Road, Miami Beach, Florida, Attorney for Respondents; and Arthur Roth, 1111 Ainsley Building, Miami, Florida 33132, Attorney for Petitioners, this 29th day of October, 1976.

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